A

Tiong Kiong Choon v Public Prosecutor and other appeals

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-09–186–06 OF 2015, W-09–187–06 OF 2015 AND W-09–188–06 OF 2015
ZAKARIA SAM, ZAMANI A RAHIM AND KAMARDIN HASHIM JJCA
21 JULY 2016

C

Criminal Procedure — Appeal — Right of — Appellants charged for offences of insider trading and abetment under s 188(4) of the Capital Markets and Services Act 2007 at sessions court — Appellants applied to High Court to set aside said charges — High Court dismissed application — Whether High Court's decision D *appealable — Courts of Judicature Act 1964 ss 3 & 50(1)*

The appellants were charged at the sessions court for the offences of insider trading and the abetment thereof punishable under s 188(4) of the Capital Markets and Services Act 2007. At the High Court stage, the appellants applied E to set aside and quash the said charges and for them to be discharged and acquitted but the said application was dismissed by the High Court, hence this appeal. The essence of the appellants' complaints were the charges proffered against them were defective in substance and form and the trial judge's failure F to provide the reasons in His Lordship grounds of judgment. The pertinent issue for court's consideration was whether the decision by the trial judge was appealable or not.

Held, striking out the appeals:

G (1) The ruling of the trial judge did not come within the meaning of the expression 'decision' in s 3 of the Courts of Judicature Act 1964. The High Court, in hearing the appellants' motion could not be said to be exercising its original jurisdiction, appellate or revisionary jurisdiction. Thus, the appellants' appeals were incompetent to be laid before the H court (see paras 13, 16 & 19).

[Bahasa Malaysia summary

Perayu-perayu dituduh di mahkamah sesyen bagi kesalahan-kesalahan perdagangan orang dalam dan persuhabatan yang boleh dihukum di bawah I s 188(4) Akta Pasaran Modal dan Perkhidmatan 2007. Di peringkat Mahkamah Tinggi, perayu-perayu memohon untuk mengetepikan dan membatalkan tuduhan-tuduhan tersebut dan untuk mereka dibebaskan dan dilepaskan tetapi permohonan tersebut ditolak oleh Mahkamah Tinggi, maka rayuan ini. Intipati aduan perayu-perayu adalah tuduhan-tuduhan yang

dikenakan terhadap mereka adalah cacat dari segi isi dan bentuk dan kegagalan hakim bicara untuk memberikan alasan-alasan dalam alasan-alasan penghakiman Yang Arif. Isu berkaitan bagi pertimbangan mahkamah adalah sama ada keputusan hakim bicara boleh dirayu atau tidak.

Diputuskan, membatalkan rayuan-rayuan:

(1) Perintah hakim bicara tidak merangkumi maksud penyataan 'decision' dalam s 3 Akta Mahkamah Kehakiman 1964. Mahkamah Tinggi, dalam mendengar usul perayu-perayu tidak boleh dikatakan menjalankan bidang kuasa asalnya, rayuan atau bidang kuasa semakan. Oleh itu, rayuan-rayuan perayu-perayu adalah tidak kompeten untuk dikemukakan di hadapan mahkamah (lihat perenggan 13, 16 & 19).]

Notes

For cases on right of appeal, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 921–990.

Cases referred to

Ah Poon and others v PP [2005] MLJU 566, HC (refd)
Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831; [2014] 9 CLJ 289, FC (folld)
Banwari Lal v Union of India 1963 AIR 1620, SC (refd)
Goh Keat Peng v PP [2001] 3 MLJ 172; [2001] 2 CLJ 498, HC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
Leken @ Delem ak Gerik (M) v PP [2007] 3 MLJ 730; [2007] 8 CLJ 158, HC (refd)
Lim Gais Khee v Reg [1959] 1 MLJ 206 (refd)
Mohd Hanafi Ramly v PP [2012] 2 CLJ 326, HC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Ini Abong and other trials [2008] 8 MLJ 106, HC (refd)
PP v Jorge Enrique Pellon Tellon [1998] 5 MLJ 44, HC (refd)
PP v Teoh Choon Teck [1963] 29 MLJ 34 (refd)
PP v Uthaya Kumar a/l Ponnusamy & Ors [2011] 7 MLJ 575, HC (refd)
R v Chairman, County of London Quarter Sessions; Ex parte Downes [1953] 2 All ER 750, QBD (refd)
R v Connelly [1964] AC 1254, CA (refd)
Shawal bin Hj Mohd Yassin v PP [2006] 4 MLJ 334, HC (refd)
Sheikh Hassan bin Sheikh Ibrahim v PP [1940] 1 MLJ 69, CA (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 188(2), 188(4)
Code of Criminal Procedure [IND] s 218(1)
Courts of Judicature Act 1964 ss 3, 22, 35, 35(1), 50(1)
Criminal Procedure Code ss 152, 154, 163

Appeal from: Criminal Application No 44–(22, 24, 25)–03 of 2015 (High Court, Kuala Lumpur)

Mohd Yusof Zainal Abidin (Chong Loong Men, Jaslyn Saw and Rachel Lim with him) (Lim Chong Phang & Amy) for the first appellant.
Wong Chiang Kiat (Chong Loong Men, Jaslyn Saw and Rachel Lim with him) (Lim Chong Phang & Amy) for the second and third appellants.
Awang Armadajaya (Shanti, Ros Mawar, Mohd Hafiz, Hashley Tajudin and Karl Rafiq with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

[1] This appeal relates to the dismissal of the appellants' application by way of a notice of motion to set aside and quash the charges and thereupon they be discharged and acquitted accordingly. The appellants were charged with the offences of insider trading and the abetment thereof punishable under s 188(4) of the Capital Markets and Services Act 2007 ('the CMSA'). They also prayed that the criminal trials against them in the session court at Kuala Lumpur be stayed or adjourned pending the hearing of their application.

[2] The applications was supported by their affidavits affirmed by the respective appellant. The ground of their applications is that, the charges are illegal, flawed and defective in both substance and form in breach of s 163 of the Criminal Procedure Code ('the CPC') and the non-compliance of ss 152 and 154 of the CPC.

BEFORE THE HIGH COURT

[3] Before the High Court, learned counsel for the appellants submitted that the court has inherent jurisdiction to set aside or strike out the charges against an accused person, if the charge preferred is with mala fide, oppressive and an abusive of the process of the court: see *R v Chairman, County of London Quarter Sessions; Ex parte Downes* [1953] 2 All ER 750, *R v Connelly* [1964] AC 1254, and *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544 which were cited to us by learned counsel for the appellants.

[4] Apart from decided cases, learned counsel also referred the trial judge to s 35 of the Courts of Judicature Act 1964 ('the CJA') which provides supervisory jurisdiction on the High Court to hear, and if deemed fit, to allow the appellant's application, if it appears desirable in the interest of justice. Section 35(1) of the CJA provides:

> 35(1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary

> jurisdiction over all subordinates courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether in civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

[5] Further, learned counsel submitted that it is trite law that upon instituting charges against an accused person, the prosecution's executive role is complete. Consequently, any conduct of the proceedings thereafter shall come within the jurisdiction of the court. In other words, once the case comes to the court, the power of the public prosecutor ceases. If there is a challenge to the prosecutorial decision to prosecute, the court has always an inherent jurisdiction to hear it: see *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 5 MLJ 44; and *Public Prosecutor v Ini Abong and other trials* [2008] 8 MLJ 106. In such a case, the court cannot be said to have interfered or usurped the power of the public prosecutor should the application be allowed.

[6] In the High Court, learned counsel for the appellants submitted that the charges ought to be struck out or set aside as they were illegal, flawed, incomplete and defective. The gist of learned counsel's submission is that, all the offences faced by the first appellant, three charges against the second appellant and four charges against the third appellant were bad for multiplicity of charges. Each appellant should be indicted with one charge only for all the trades done even on different days as it was based on the same non-public material information. The learned counsel relied on the Indian authority of *Banwari Lal v Union of India* 1963 AIR 1620 and the local authorities of *Leken @ Delem ak Gerik (M) v Public Prosecutor* [2007] 3 MLJ 730; [2007] 8 CLJ 158; *Mohd Hanafi Ramly v Public Prosecutor* [2012] 2 CLJ 326; *Sheikh Hassan bin Sheikh Ibrahim v Public Prosecutor* [1940] 1 MLJ 69; *Shawal bin Hj Mohd Yassin v Public Prosecutor* [2006] 4 MLJ 334; *Ah Poon and others v Public Prosecutor* [2005] MLJU 566; *Public Prosecutor v Uthaya Kumar a/l Ponnusamy & Ors* [2011] 7 MLJ 575; *Goh Keat Peng v Public Prosecutor* [2001] 3 MLJ 172; [2001] 2 CLJ 498; *Public Prosecutor v Teoh Choon Teck* [1963] 29 MLJ 34; and *Lim Gais Khee v Reg* [1959] 1 MLJ 206. Learned counsel also quoted the passage from *The Code of Criminal Procedure* by Rantanlal and Dhirajlal (18th Ed) at p 861. It concerns s 218(1) of the Indian Code of Criminal Procedure which is almost in pari materia to our s 163 of the CPC. The learned authors expressed their view as follows:

> For every distinct offence of which any person is accused — The expression 'every distinct offence' must have a different context from the expression 'every offence' or 'each offence'. A separate charge is required for every distinct offence and not necessarily for each separate offence. 'Distinct' means 'not identical'. It stress

characteristics that distinguish, while the word 'separate' would stress the 'two things not being the same'. Two offences would be distinct if they be not in any way inter-related.

[7] In the court below, the prosecution took the stand that the facts of the case in the authorities cited by learned counsel are distinguishable. It was argued that the actus reus of the offence under s 188(2) of the CMSA is completed upon the act of either acquiring or disposing the related shares. The amount of shares which was acquired or disposed is not the element of the crime. But the act of acquiring or disposing the shares would fulfill the element for the offence under the said section. Therefore, it follows that when the shares was acquired or disposed in several trenches, it is a separate and distinct offence.

[8] The learned trial judge agreed with the argument advanced by learned deputy. At pp 17–18 of the AR Vol 1, the trial judge had delivered his brief decision in Bahasa Malaysia as follows:

> Oleh itu mahkamah berpandangan bahawa pertuduhan-pertuduhan sah, teratur, tidak cacat dan tidak berganda. Mengenai isu kedua, s 152 Kanun Tatacara Jenayah ... mahkamah berpandangan bahawa butir-butir yang mencukupi telah dinyatakan dalam pertuduhan-pertuduhan ke atas pemohon. Beliau boleh membuat pembelaan sewajarnya.
>
> Berdasarkan alasan-alasan ... di atas, mahkamah menolak permohonan pemohon. Kes perbicaraan akan diteruskan di mahkamah sesyen seperti yang ditetapkan.

[9] The appellants, being dissatisfied, now appealed to this court.

THE APPEAL

[10] In his submission before us, learned counsel for the first appellant raised three issues, namely:

(a) the two charges against the first appellant do not involve distinct offences;

(b) the two charges are defective; and

(c) the information stated in the charges is not information related to securities as envisaged by s 188(2) of the CMSA.

[11] The learned counsel for the second and third appellants canvassed six grounds of appeals as follows:

(a) it is a non-speaking judgment of the trial judge;

(b) there is only a singular offence and not distinct offences;

(c) there was only one information involve which formed the basis of the original intention;

(d) the charges are defective and unknown in law;

(e) the charges failed to include all the ingredients of the prescribed offence; and

(f) the alleged information relates to privatization and not securities.

OUR FINDINGS

[12] The crux of the appellants complaints were the charges proffered against them were defective in substance and form and the trial judge failure to provide the reasons in His Lordship grounds of judgment. Thus the appellants' application was dismissed. We would like to emphasis here that we are not concern whether the trial judge was correct in his ruling or otherwise. The pertinent issue to be considered at this stage is whether the *decision* by the trial judge is appealable or not.

[13] This bring us to the meaning of the term 'decision' as defined in s 3 of the Courts of Judicature Act 1964 ('the CJA'). The term 'decision' is defined:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

Having considered the appellants' appeal, we are of the view that the ruling of the trial judge does not come within the meaning of the expression 'decision' in s 3 of the CJA.

[14] Whether there is a right of appeal or otherwise in this case is govern by s 50(1) of the CJA, the relevant part of which reads:

> 50 Jurisdiction to hear and determine criminal appeals.
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court –
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the sessions court.

[15] Therefore the issue now is whether the High Court in deciding the motion of the appellants was exercising either its original jurisdiction, appellate jurisdiction or revisionary jurisdiction. If the answer is 'yes', then this court has the jurisdiction to hear their appeals. The criminal jurisdiction of the High

Court is to be found in s 22 of the CJA which reads:

> 22 Criminal Jurisdiction
>
> (1) The High Court shall have jurisdiction to try:
>
> (a) all offences committed:
>
> (i) within its local jurisdiction;
>
> (ii) on the high seas on board any ship or on any aircraft registered in Malaysia;
>
> (iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft:
>
> (iv) by any person on the high seas where the offence is piracy by the law of nations; and
>
> (b) offences under Chapter VI of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-territorial Offences Act, 1976, or offences under any other written law the commission of which is certified by the Attorney-General to effect the security of Malaysia committed, as the case may be:
>
> (i) on the high seas on board any ship or on any aircraft registered in Malaysia;
>
> (ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or
>
> (iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.
>
> (c) The High Court may pass any sentence allowed by law.

[16] We are of the view that the High Court, in hearing the appellants' motion cannot be said to be exercising its original jurisdiction. Neither it can be said to be exercising its appellate or revisionary jurisdiction. We find support in our view from the decision of the Federal Court in the case of *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831; [2014] 9 CLJ 289 where His Lordship Raus Sharif PCA said at p 303:

> [22] As stated earlier, learned counsel's contention was that the High Court in hearing the motion was in fact exercising its original jurisdiction and thus the decision of the Court of Appeal on the matter was appealable to the Federal Court. With respect, we disagree. We are of the view that the High Court, in hearing the motion cannot be said to be exercising its original jurisdiction. This is because the subject matter of the motion was in relation to the charges that were preferred against the appellant in the sessions court. Without the charges in the sessions court, the appellant has no basis to file the motion before the High Court. In short the application cannot stand on its own. In fact even the motion filed was premised on the criminal trial number of the sessions court.

[23] It is our view that the High Court in the instant case was not the trial court. The trial court has to be the sessions court. No doubt the hearing of the motion was first exercised by the High Court, but the hearing before the High Court cannot be equated to that of a court of first instance. The High Court in doing so was not exercising its original jurisdiction. In the present case as the jurisdiction to try the charges was entrusted to the sessions court, the High Court in hearing the motion cannot be said to be exercising its original jurisdiction.

[17] Further at p 309, His Lordship observed:

[33] It can be seen from the above that issues raised by the appellant were preliminary issues ie, basically whether the charges were defective in substance and form. The High Court as stated earlier dismissed the appellant's application to strike out the charges and to have him acquitted and discharged. Clearly the decision of the High Court was on a preliminary issue which did not finally dispose of the rights of the parties. *It is thus not appealable.* (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [1999] 1 CLJ 537; [1999] 1 MLJ 321; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 9 CLJ 625; [2010] 6 MLJ 586; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2011] 2 CLJ 845; *Public Prosecutor v Dato' Seri Anwar Ibrahim* [2014] 5 CLJ 805).

[34] *We are of the view that the appeal by the appellant to the Court of Appeal and later to this court on a preliminary issue whether the charges against the appellant in the sessions court were defective in form and substance were clearly an abuse of the court process* ... (Emphasis added.)

[18] Further down at p 312, the decision was summarised by His Lordship as follows:

[39] In this instant case the appellant had applied before the High Court to quash the charges and order an acquittal against him. The application was dismissed. The appellant had also applied before the sessions court for the charges to be quashed and prayed that a discharge not amounting to acquittal to be ordered against him. The application was also dismissed. The way we perceive it, the orders, of the courts below would connote that the matter should proceed for trial as the charges preferred against the appellant still stand. *Clearly the decision not to strike out the charges before the commencement of the trial as was done in this instant case does not amount to disposal of the rights of the parties. Since the order gives no final decision on the matters in dispute, it is not a 'decision' within the definition under* s 3 of the CJA *and therefore is not appealable.*

[40] *It was for the above reasons we are hold that this appeal is on a matter which is incompetent to be laid before this court and was therefore struck out. (Emphasis added.)*

[19] Similarly, based on *Ahmad Zubair*, the appellants appeals was incompetent to be laid before us. We therefore struck out their appeals without having to dwell on its grounds of appeals.

A *Appeals struck out.*

Reported by Dzulqarnain Ab Fatar

B

C

D

E

F

G

H

I